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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 346.

MORRIS B. SACHS, T. C. WITT, GIZELLA WITT, ANNA CHRISTENSEN, PETER VISSER AND WILLIAM STERNBERG,

Petitioners,

vs.

THE OHIO NATIONAL LIFE INSURANCE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Want of jurisdiction should first be noted.

Objection to Jurisdiction.

This court is without jurisdiction to issue a writ of certiorari because no application therefor was made within the time required by statute (28 U. S. C. A., § 350).

The three months allowed for making such application

expired June 21, 1945 (R. 647). On June 19, 1945, an order was entered purporting to extend the time for filing the petition to and including August 21, 1945 (R. 652)—which was 63 days after the order was entered and 61 days after the time for making application for the writ had expired.

The only extension authorized is one "not exceeding 60 days" (28 U. S. C. A., §350). The attempted extension violated this statutory limitation, transcended the power granted, and was void. See 4 C. J. S. 930, § 458; *Connecticut M. & T. Co.* v. *Di Francesco,* 112 Conn. 673, 675, 151 Atl. 491. The late filing of the petition on August 20 did not give this court jurisdiction. *Monks* v. *Lee,* 317 U. S. 590, 87 L. ed. 483; *Cresswell* v. *Tillinghast,* 286 U. S. 560, 76 L. ed. 1293.

No Statutes Are Involved.

This was a suit on a contract between two private corporations and involved the construction and application of that contract. The provisions of the Illinois Constitution and statutes relating to bank stockholders' liability referred to by petitioner, were not involved therein and were not cited or considered by the court below. The decision was predicated upon established principles of contract law and not upon statutory provisions.

Statement—Corrections.

This was not a stockholders' liability suit. It was an action on a "Reinsurance Agreement" whereby the defendant, The Ohio National Life Insurance Company, reinsured the risks of the American Old Line Insurance Company (R. 36, 638). To effect such reinsurance, respondent took over certain assets of the American Old Line and assumed its insurance contracts and liabilities (R. 36, 435-

445, 642). Said Reinsurance Agreement was predicated upon a warranty of the accuracy of the books and records of the American Old Line (R. 37).

More than eleven years after the Reinsurance Agreement was executed, petitioners filed this suit, contending that by said Reinsurance Agreement respondent had assumed an alleged liability of the American Old Line as a stockholder of the Roseland Bank, and that, as creditors of said bank, petitioners could sue on said Reinsurance Agreement (R. 2-44).

The defenses were that petitioners were not third party beneficiaries under said contract, that the alleged stockholders' liability had not been assumed by respondent, and that petitioners were barred by laches and a breach of said warranty as to the accuracy of the books and records upon which the Reinsurance Agreement was premised (R. 44-57). At the trial, a fifth defense arose because petitioners failed to adduce competent proof of their alleged claims (R. 608).

The Master, trial court, and Circuit Court of Appeals all concurred in finding that (1) petitioners are not third party beneficiaries and cannot sue on the Reinsurance Agreement, and (2) that the alleged stockholders' liability was not assumed (R. 605-613, 622, 638-646). The trial court further held that petitioners were barred by a breach of said warranty (R. 622). The remaining defenses were not passed upon.

No Grounds Exist for Allowance of Certiorari Herein.

Petitioners advance two arguments for granting a writ of certiorari herein, (1) that the court below has decided a question of federal law in conflict with the decisions of other Circuit Courts of Appeals, and (2) that said court decided a question of local law in conflict with State Court decisions. Neither of these contentions is factually sound.

I.

THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUIT COURTS OF APPEALS.

A. The court below followed established practice in reviewing questions of fact herein.

The question of federal law, about which petitioners contend a conflict exists, involves the extent to which a record will be examined by a Circuit Court of Appeals in reviewing findings of fact (Pet. 7-8).

Petitioners claim that in reviewing findings of fact, the Circuit Court of Appeals herein limited its examination of the record to determining whether such findings had "*any rational* basis to support them", and thereby adopted a practice in conflict with the decisions of other Circuit Courts of Appeals. In doing so, petitioners focus attention upon the words "any rational basis" and place thereon a wholly unwarranted emphasis and construction.

When the *entire* opinion is examined (rather than an isolated phrase wrenched from its context), it is clear that the court below meant only to express and apply the rule that concurrent findings of fact by a Master and trial court will not be disturbed unless "clearly erroneous" or "plainly without support". *General Talk. Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14. Thus, when the court came "to a consideration of the facts" (R. 641), it carefully examined the testimony of all witnesses, and documentary evidence, and concluded that the concurrent findings of the Master and trial court had "*ample support* in the record and must be accepted." (R. 641-646.)

The same rule has been expressed in similar—although

slightly different—language and has been uniformly followed by other Circuit Courts of Appeals. *Fruehauf Trailer Co.* v. *Bridge,* 84 F. (2d) 660, 663 (C. C. A. 6th); *The Tourist No. 2,* 64 F. (2d) 669 (C. C. A. 9th); *Stewart* v. *Wall,* 87 F. (2d) 598, 599 (C. C. A. 4th); *Levin Bros.* v. *Davis Mfg. Co.,* 72 F. (2d) 163, 165 (C. C. A. 8th); *Seeley* v. *Hunt,* 109 F. (2d) 595, 596 (C. C. A. 5th); *Continental Corp.* v. *National Union Radio Corp.,* 67 F. (2d) 938, 943 (C. C. A. 7th); *Zimmerman* v. *Daley,* 61 F. (2d) 518, 519 (C. C. A. 1st); *Miller* v. *United States,* 57 F. (2d) 987, 990 (C. C. A. 10th).

There is no inconsistency between the action of the trial court below in reviewing findings and the action of the court in the cases cited by petitioners. Even petitioners' citations do not employ identical phraseology in expressing the rule to be applied, and not all of them involve findings which have been concurred in by both the Master and the trial court. There is no conflict, sufficient to sustain certiorari, between the phraseology employed by the court below and the language of other Circuit Courts of Appeals, in describing the same rule.

Regardless of the varying expressions used in describing that rule, Circuit Courts of Appeals have uniformly refused to disturb the concurrent findings of a Master and trial court, unless the record shows the same to be clearly erroneous. That this is the rule followed by the court below is clear from its consideration of the oral and documentary evidence, and from its conclusion that the findings have "ample support" in the record (R. 646).

B. Certiorari will not be granted to review evidence.

It is obvious from the above and from petitioners' extended discussion of facts (Pet. 11-14), that they are in reality asking this court to review the evidence and to

afford them another hearing on the correctness of the result reached in the trial court. It is well settled that this court will not grant certiorari for such purpose. *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U. S. 508, 509; *General Talk. Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 178.

The classical statement of this rule is to be found in *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163, where Chief Justice Taft said:

> "The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. **The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.** Our experience shows that 80 per cent of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Bold face type ours.)

Because we do not believe that a minute examination of the evidence is relevant to consideration of whether a writ should issue herein, we omit reference to petitioners' arguments on the facts (Pet. 11-14). The opinion of the court contains a full discussion of the facts and evidence amply supporting the findings of the Master and trial court. If such matters are germane herein—which respondent denies—reference is made to the appendix attached hereto.

II.

NO IMPORTANT QUESTION OF LOCAL LAW WAS DECIDED CONTRARY TO APPLICABLE DECISIONS OF ILLINOIS COURTS.

A. The question of local law is not an important one.

Rule 38 (5) (b) of this court requires that the local question be an "important" one. Importance is therefore an essential element for the exercise of jurisdiction of this court on certiorari. *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163; 11 Cyc. of Federal Procedure (2nd ed.) 51, § 5414.

The contract sued upon was a "Reinsurance Agreement" between two life insurance companies for the purpose of effecting reinsurance of the policies of the American Old Line (R. 36). The question of whether that contract was made for the direct benefit of petitioners, so that they might sue thereon as third party beneficiaries, is not sufficiently important to warrant the issuance of a writ herein.

That question is important only to the parties litigant. It relates to and affects only their private rights. It involves no public rights or interests. No principles of universal application are involved and the question is not of a recurring nature. This court has not previously recognized a decision on such a question to be grounds for granting certiorari.

B. The decision on local law is not in conflict with decisions of Illinois courts.

In denying petitioners' right to sue as third party beneficiaries under the contract here involved, the Master and courts below carefully examined and cited applicable

State Court decisions. They relied upon and quoted from the leading Illinois case of *Carson, Pirie, Scott & Co.* v. *Parrett,* 346 Ill. 252, 257, cited by petitioners (Pet. 15), which holds that the right of a third person not a party to a contract to sue thereon depends upon whether the contract was "made for his direct benefit" or whether the benefit to said person is merely "incidental" (R. 640). Illinois courts recognize the right to sue in the first situation and deny it in the second.

The Master and trial judge, both of whom long served as judges of the State Court before appointment to the Federal Judiciary, found as a fact that the Reinsurance Agreement was not made for the direct benefit of petitioners and that any benefit which might accrue thereunder was purely incidental (R. 609-11, 622). These findings are amply supported by the evidence. In affirming this finding, the Circuit Court of Appeals cited numerous Illinois cases (R. 640-41) and quoted from its own decision in *Vilter Mfg. Co.* v. *Loring,* 136 F. (2d) 466, in which the Illinois law relating to the right of a person—not a party to a contract—to sue thereon was exhaustively examined. From those authorities, the court correctly concluded that under the Illinois law the test of whether a third person may sue on a contract depends upon whether the contract was made for the direct or primary benefit of the third person (641).

The court below also cited *Kilburg* v. *Petrolagar Laboratories,* 280 Ill. App. 527, which involved the precise legal point which petitioners seek to review herein. The contract in that case contained defendant's unqualified promise "to pay all bills and invoices for labor and materials, as contracted, as and when the same become due and payable". Nevertheless, the Illinois court denied recovery to the materialmen on the ground that the contract was

not made for their benefit and that any benefit to them was "merely incidental". The decision in that case conforms to the decisions of both lower courts herein.

The *Novosk* case (323 Ill. App. 544), cited by petitioners, merely holds that a third party beneficiary need not be named in the contract *provided* "he is otherwise sufficiently described or designated". Obviously that case has no application in a situation where, as here, plaintiffs were not named, described, or designated in any manner by the Reinsurance Agreement.

Since respondent was never the owner of bank stock, the irrelevance of petitioners' reference to back stockholders' liability is apparent (Pet. 14-15). No question of the liability of the American Old Line as a bank stockholder was presented on the appeal and that liability was not considered or passed upon by the courts below.

The Circuit Court of Appeals correctly cited and followed applicable Illinois decisions on the question of petitioners' right to sue as a third party and there is no conflict between that decision and the applicable decisions of Illinois courts on this point.

The jurisdiction of this court on certiorari is exercised sparingly and only in cases of particular gravity and general importance, or in order to secure uniformity of decisions. *Hamilton Brown Shoe Co.* v. *Wolf*, 240 U. S. 251, 258; *Magnum Import Co.* v. *De Spoturno Coty*, 262 U. S. 159, 163.

This case does not present such gravity, importance or conflict of decisions as to justify this court in assuming jurisdiction herein. The writ should be denied.

Respectfully submitted,

KARL EDWIN SEYFARTH,
Counsel for Respondent.